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American Automobile Insurance Company v. Jerry Bartlett, Administrator of the Estate of Mary C. Bartlett

Reply Brief 1975-SC-1110

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REPLY BRIEF

560 SW 2d 6

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SUPREME COURT OF KENTUCKY

File No. 75-1110

AMERICAN AUTOMOBILE INSURANCE COMPANY - - - - - - - Appellant

versus

JERRY BARTLETT, Administrator of the Estate of Mary C. Bartlett - - - Appellee

APPEALED FROM THE JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, FOURTH DIVISION
GEORGE B. RYAN, JUDGE

REPLY BRIEF FOR APPELLANT, AMERICAN AUTOMOBILE INSURANCE COMPANY

ROBERT C. HOBSON
JOHN P. SANDIDGE
WOODWARD, HOBSON & FULTON
1805 Kentucky Home Life Building
Louisville, Kentucky 40202

Attorneys for the Appellant, American Automobile Insurance Company

This is to certify that a copy of the foregoing was mailed to Mr. Carl J. Bensinger, Attorney for the Appellee, Jerry Bartlett, Administrator of the Estate of Mary C. Bartlett, 1509 Kentucky Home Life Building, Louisville, Kentucky, 40202,, and Hon. George B. Ryan, Jefferson Circuit Court, Common Pleas Branch, Fourth Division, Jefferson County Court House, Louisville, Kentucky, 40202, this the 24 day of May, 1976.

JOHN P. SANDIDGE
Attorney for Appellant, American Automobile Insurance Company

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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> **"(b) Any amount payable under the terms of this Part because of bodily injury (death) sustained in an accident by a person who is an insured under this Part shall be reduced by**
>
> **(1) all sums paid on account of such bodily injury (death) by or on behalf of (i) the owner or operator of the uninsured automobile and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under Coverage A. . . ."**

Since $25,000.00 Was Admittedly Paid by the Insurer, Aetna Life & Casualty Company, of Deced-

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PURPOSE OF APPELLANT'S REPLY BRIEF

The purpose of this Reply Brief is to reply to the arguments presented in the Appellee's Brief.

QUESTIONS TO WHICH THIS BRIEF IS DIRECTED

1. Were all of the issue concerning the terms and conditions of the insurance policy before the Court for its consideration under the pleadings, and did the trial court abuse its discretion in not permitting the filing of the first and second amended answers?
2. The uninsured motorist portion of the insurance policy of the defendant insurer, American Automobile Insurance Company, of the insured, Plaintiff's decedent, did not apply because it is uncontroverted that neither the representative nor counsel nor anyone for and on behalf of the Plaintiff's decedent obtained the consent of this Defendant, American Automobile Insurance Company, as required by the provisions of said policy holding that the uninsured motorist portion does not apply to bodily injury (death) to an insured with respect to which such insured, his legal representative, or any person entitled to payment under this section shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor; and plaintiff's proof and Defendant's proof through avowal show conclusively that the Plaintiff received a settlement of $25,000.00 from the insurer of the host driver of the Plaintiff's decedent without any knowledge of this Defendant or any of its representatives at said time and not until after said settlement and no consent was ever given.
3. Defendant American, was further entitled to Judgment upon its motion for directed verdict as well as upon its motion for Judgment notwithstanding the verdict because of the provision of said policy as follows:

"(b) Any amount payable under the terms of this Part because of bodily injury (death) sustained in an accident by a person who is an insured under this Part shall be reduced by . .

(1) all sums paid on account of such bodily injury (death) by or on behalf of (i) the owner or operator of the uninsured automobile and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under Coverage A . . ."

Since $25,000.00 was admittedly paid by the insurer, Aetna Life & Casualty Company, of decedent's host, Thacker, the insured, there is no sum due under the uninsured motorist portion of Defendant's (American's) policy by reason of this "reducing clause."

4. The uncontradicted proof showed that the plaintiff had received a settlement of $25,000.00 and by reason of said settlement and the proof showing that the limit of liability of the insurer of the decedent's host, Thacker, being $25,000.00 for a single personal injury or death in a single accident and was the limit of the obligation of said insurer to pay on behalf of said insured the sum which the insured shall become legally obligated to pay as damages because of said injury (death) of the Plaintiff's decedent by reason of the operation of said insured vehicle, and there was additional coverage of uninsured motorist with said company with the insured being the host, Thacker, and consequently the Plaintiff having collected and settled the $25,000.00 claim against the host, Thacker, by reason of her alleged negligent operation of the said vehicle, Plaintiff is estopped to claim that the uninsured motorist provision of the Defendant's policy comes into play since the two positions are irreconcilable and in conflict.

5. Decedent's host, Thacker, had with Aetna Life and Casualty Company $10,000.00 uninsured motorist coverage and $25,000.00 liability limit coverage for personal injury to one person or for death to one person in each

occurrence and settled said total exposure of $35,000.00 if there had been joint negligence for the sum of $25,000.00, and Defendant is entitled to a credit of $35,000.00 being the $10,000.00 uninsured motorist coverage and the $25,000.00 bodily injury coverage of the host, Thacker, as primary insurance before the secondary uninsured motorist coverage of the Defendant as the insurer of the Plaintiff's decedent comes into effect.

6. Under the undisputed facts in this case American Automobile Insurance Company was entitled to have its motion for directed verdict sustained by the trial court as well as its motion for Judgment Notwithstanding the Verdict sustained. The trial court abused its discretion in not permitting to be filed the amended answer tendered one month before trial or the supplemental answer tendered to conform to the proof.

SUPREME COURT OF KENTUCKY

File No. 75-1110

AMERICAN AUTOMOBILE INSURANCE COMPANY - - - - - - - *Appellant*

v.

JERRY BARTLETT, Administrator of the Estate of Mary C. Bartlett - - - - *Appellee*

APPEALED FROM THE JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, FOURTH DIVISION
GEORGE B. RYAN, JUDGE

REPLY BRIEF FOR APPELLANT, AMERICAN AUTOMOBILE INSURANCE COMPANY

May it please the Court:

ARGUMENT

1. Were All of the Issues Concerning the Terms and Conditions of the Insurance Policy Before the Court For Its Consideration Under the Pleadings, and Did the Trial Court Abuse Its Discretion in Not Permitting the Filing of the First and Second Amended Answers?

A. THE ISSUES WERE BEFORE THE COURT ON THE PLEADINGS AND THE UNDERSTANDING OF COUNSEL.

In order to answer the Appellee's Question A to the effect that the Appellant failed to affirmatively plead the defenses alleged in the Appellant's Brief, we should look at the facts of this case as they pertain to the

procedure. The Complaint in this action was filed on November 30, 1974 (T.R. 2). The Answer was filed on December 20, 1974 (T.R. 5). The action was tried before a jury on June 19 and 20, 1975. It is perfectly apparent that a short time elapsed between the filing of the Complaint and the trial.

Another unusual situation is that the case was not pre-tried as is the general rule with the Trial Court (T.E. 163). Thus, the question of these defenses was not determined in advance of trial, and the Trial Court so stated (T.R. 163).

The original Answer filed by American Automobile Insurance Company stated as follows (T.R. 5):

> "5. States that the American Automobile Insurance Company had in effect at one time an insurance policy in which it was the insurer of Jerry Bartlett and that said policy had an uninsured motorist provision in accordance with the terms and conditions of said policy which is in the possession of said Jerry Bartlett. Said defendant is without sufficient information or knowledge to form a belief as to whether or not the terms and conditions of said policy cover Mary C. Bartlett under the circumstances as alleged in paragraphs 8, 9 and 10, and hence said allegations stand denied."

On May 19, 1975, an Amended Answer (T.R. 10, 12) was filed by American Automobile Insurance Company alleging what had been discovered in the discovery process that the Plaintiff's decedent was riding in an automobile which was covered by a policy of liability insurance issued by Aetna Casualty & Surety Company cov-

ering the operator and owner of the vehicle, and that there was uninsured motorist coverage in the sum of $10,000 (T.R. 12). Also, the Amended Answer alleged that the uninsured motorist coverage of Aetna was primary and that the uninsured motorist coverage of American was secondary (T.R. 12); it was further alleged (T.R. 13) that the administrator of the estate of Bartlett received $25,000.00 from Aetna in settlement of his claim against Thacker. It was further alleged in the alternative that pursuant to the terms of its policy American Automobile Insurance Company is entitled to a reduction of its liability by all sums paid by or on behalf of any other person jointly or severally liable along with the alleged uninsured motorist and therefore is entitled to have its liability reduced by all sums paid or owing by Aetna Casualty & Surety Company under its liability and/or uninsured motorist coverages.

It was further alleged that there was no physical contact between the vehicle in which the decedent was riding and the alleged hit-and-run insured vehicle at the time of the accident, and, therefore, there was no uninsured motorist coverage under its policy. The Trial Court refused (T.R. 11) to allow this Amended Answer to be filed.

The deposition of Jerry Bartlett was taken on May 29, 1975, and at that time (pp. 29-31) it became apparent that there was an additional agreement between Bartlett, Administrator, and the Aetna Casualty Company concerning the payment of the $25,000.00 and the release of the claim against Aetna and its insured,

Thacker. Mr. Bensinger, Attorney for the Appellee, promised to secure a copy of this Agreement and give to the counsel for American.

This promise was not fulfilled (T.E. 3), and on June 19, 1975 demand was made for this Agreement (T.E. 3, 11). When Mr. Bensinger was asked by the Court if he had the Agreement (T.R. 12) he said he did, but Aetna had not permitted him to release it. The Trial Court (T.E. 13) then directed Mr. Bensinger to deliver the Agreement which is tendered as Defendant's Exhibit 1 (T.E. 13) which proved to be an Indemnification Agreement (Tendered Exhibit 1) between Carl J. Bensinger, Attorney for Jerry Bartlett, Jerry Bartlett the Administrator of the Estate and the Aetna Life & Casualty Company whereby said Bensinger and Bartlett agreed to indemnify the Aetna for all payments and legal defense costs in excess of the $25,000.00 payment incurred as the result of defending pending or future litigation brought by the Estate of Mary C. Bartlett against any alleged uninsured motorist and/or against the Aetna Life & Casualty Company as uninsured motorist carrier for Henry Lewis Thacker and Mary Thacker.

The next day (T.E. 130), June 20, 1975, American tendered its Supplemental Answer (T.R. 22) alleging that $25,000.00 had been paid by Aetna as insurer for Thacker to the Bartlett Estate without the consent of American; and further, said sum paid to Bartlett reduced the coverage of $10,000.00 in the herein action leaving no uninsured motorist coverage available. It is

also interesting to note that the Indemnification Agreement was executed on February 15, 1975.

Before the Trial began (T.E. 8) counsel for American moved to file the Amended Answer filed on May 19 (T.E. 8), concerning the question of the uninsured motorist coverage of American being secondary and Aetna being primary as it was the insurer of the vehicle owned by Thacker. In the discussions between counsel and the Court prior to the trial, it was determined that the secondary and primary coverage questions were one of law which would be determined by the Court if necessary depending on the verdict. The discussions were as follows:

> "Mr. Bensinger: Yes, Sir. Let me explain to you what this is. It really has nothing to do with the case and let me see if I can explain my understanding of the law and I have tried to explain this to Mr. Hobson. Aetna gave me $25,000.00 under their liability policy. Now both Aetna and the American Automobile have this uninsured primary secondary question of $10,000.00. There is a question who comes first and who comes second of the $10,000.00. Now I have discussed that with Mr. Hobson, and that's a legitimate question we may or may not get into depending on the size of this jury verdict. If the jury verdict is $45,000.00 then there is no argument. We're all just wasting our time because there is no doubt about it Mr. Hobson's $10,000.00 policy comes into play and that's it. They pay their $10,000.00 and the case is over. Now if the jury verdict is under $25,000.00 they walk away from the case because I've already got $25,000.00 I told Mr. Hobson this, from the Aetna. No question about it. I have received twenty-five. Now if it's in the area above

$25,000.00 then I would imagine Your Honor would want us to do some law work as to the primary and secondary of that $10,000.00. Now I'm only going to get it, if I get it, from American. I don't have to. I'm not going to get it from Aetna. And I tried to explain that to Mr. Hobson. Aetna's out of it. I have gotten twenty-five. They're not in this case. I'm not going to get any more and I want to—

The Court: Do you have the agreement?

Mr. Bensinger:—and I will gladly . . . I have an indemnification agreement that I gave Aetna just on this basis—

The Court: Is that what you want to see?

Mr. Bensinger:—but I don't—it doesn't belong in this case. I don't want to get this case mixed up with Aetna—and they—the Aetna man asked me not to produce this, because Mr. Hobson had asked them for it, and I just want to make sure that—

The Court: (interrupting) Tell them the Court did.

Mr. Bensinger:—that the Court is asking.

Mr. Hobson: Well, I'd like for it to be made a part of the record, please, Miss Mary, the indemnification agreement, and, Mr. Bensinger, what you said I completely concur with with the one reservation that it strikes me clear that our coverage is primary and if you have agreed that, and you have agreed as indicated by that indemnifying agreement, that if a verdict is returned of $35,000.00 or less we owe nothing unless you can show the Court that our coverage is primary, as we understand the concept of primary and secondary coverage. If it's in excess of $35,000.00 we owe up to $45,000.00.

Mr. Bensinger: Well, that's the real question. I think we're going to see whether we'll get into

> that or not, whether your $10,000.00 comes in after twenty-five or after thirty-five which may be a moot question after this case.
>
> Mr. Hobson: It could very easily be. Alright. Then we understand each other."

Thus, it is apparent that these questions were to be handled as a matter of law.

While the Court indicated that the Supplemental and Amended Answers were too late (T.E. 163), and for that reason he would not follow the cases dealing with failure to secure consent by the uninsured motorist before settling with one tort feasor, the Trial Court also indicated that these defenses were a matter of law and that he would permit them to be made by avowal but not permit evidence to be heard by the jury concerning them (T.E. 168).

American moved for a Directed Verdict at the conclusion of the Defendant's proof (T.E. 178) for the reasons previously stated (T.E. 164). American then filed a Motion for Judgment Notwithstanding the Verdict (T.R. 32) raising the questions from which evidence was excluded to the jury and which questions involved matters of law.

First as to the allegations raised in the Complaint and the Answer, it is clear that the issues raised in the Appellant's Brief are present. This is because of the affirmative pleadings in the Plaintiff's Complaint. In paragraph 8 of the Complaint (T.E. 3) it is alleged that there is in full force and effect a policy in favor of Jerry Bartlett and Mary C. Bartlett covering among other things for medical payments and for uninsured

motorist coverage. In paragraph 9 of the Complaint (T.E. 3) it is alleged that the accident referred to in paragraph 2 is an uninsured motorist claim within the meaning and definition of said policy issued by American Automobile Insurance Company. In addition, in paragraph 10 of the Complaint (T.E. 3) it is alleged "that the damages complained of by the Plaintiff, Jerry Bartlett, are properly covered in said American Auto Insurance Company policy issued to Jerry Bartlett and that said Defendant, American Automobile Insurance Company, has declined payment under said policy and said declination is wrongful and unlawful."

In the Defendant's Answer (T.E. 5) as to paragraph 10 concerning damages it was alleged:

> "5. States that the American Automobile Insurance Company had in effect at one time an insurance policy in which it was the insurer of Jerry Bartlett and that said policy had an uninsured motorist provision in accordance with the terms and conditions of said policy which is in the possession of said Jerry Bartlett. Said defendant is without sufficient information or knowledge to form a belief as to whether or not the terms and conditions of said policy cover Mary C. Bartlett under the circumstances as alleged in paragraphs 8, 9 and 10, and hence said allegations stand denied."

Thus, the question of "damages" being properly covered "in" the policy was affirmatively alleged in the Complaint and it was denied in the Answer. Since there has been an affirmative allegation in the Complaint concerning the amount of recovery under the policy and the limitations on that amount which has been denied

in the Answer, the issue is before the Court as to whether the terms, conditions and exclusions have been met. The effect of the allegations in the Complaint are that the exclusions are not present. The denial of this fact properly places before the Court the question of the exclusions. This is in accordance with the provision of CR 8.06 which provides:

> "All pleadings shall be so construed as to do substantial justice."

Ritchie v. *United Mine Workers of America,* CA 6th, 410 F. 2d 827, 832-833; *Mutual Creamery Ins. Co.* v. *Iowa National Mutual Ins. Co.,* CA 8th, 427 F. 2d 504, 507; 2A Moore's Federal Practice §8.34, p. 1895 hold the correct principle for interpreting pleadings in the light of this rule are set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U. S. 41, 48, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 as follows:

> "Following the simple guide of Rule 8 (f) that 'all pleadings shall be so construed as to do substantial justice,' we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

See also *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500, 506, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959), *Clausen & Sons, Inc.* v. *Theo, Hamm Brewing Co.,* CA 8th, 395 F. 2d 388, 389, 390. Thus, under the orig-

inal pleadings these issues should be considered and an affirmative pleading was not required.

For the above reason *General Exchange Insurance Corporation* v. *Branham,* 296 Ky. 711, 178 S. W. 2d 409 which was decided in 1944 is not in point. It was decided before the current Rules of Civil Procedure were enacted in Kentucky and it is difficult to assume that the same decision would now be reached. Certainly, a denial of an allegation in the Complaint puts it in issue and under the new Rules of Civil Procedure as interpreted by the Supreme Court in interpreting similar Federal Rules of Civil Procedure such a conclusion could not be reached. Here there was a pleading in the Complaint that the Plaintiff furnish the Insurance Company a proof of loss which was denied by the Insurance Company. The allegation in the Complaint was regarded as surplusage. Certainly, such a result could not be reached under the Supreme Court's interpreting of the Federal Rule which is the exact same rule as contained in CR 8.06. For the same reason *Kinnarney* v. *Corcoran,* 285 Ky. 702, 149 S. W. 2d 32 is not in point.

Crowder v. *Stinson,* Ky., 401 S. W. 2d 761 does not help the Appellee in his position. CR 8.03 specifically provides that "illegality" must be affirmatively plead. However, the Court concludes at page 762 as follows:

> "Notwithstanding the procedural pitfall mentioned above, the Trial Court submitted to the jury Appellant's theory of the case, and it found for the Appellee. We think Appellant has had his day in Court and a fair trial."

Thus, in actuality the question of illegality was tried in the Trial Court, which did not occur here.

Cox v. *Owensville Mutual Benefit Aid Association,* Mo., 185 S. W. 2d 28 is not in point because of the understanding between the Court and the Attorneys for the parties to the effect that depending on the amount of the juries verdict the issue of whether or not American's policy was primary or secondary as to Aetna's policy, would later be determined by the Court as a question of law. Moreover, by placing in evidence the testimony concerning the defenses raised in the Amended Answer and Supplemental Answer the case was tried on the theory that these defenses were available. This is not a case of a new theory being advanced by the Appellant in the Appellate Court as against that utilized in the Trial Court. The Appellant has been consistent with these defenses, but the Trial Court would not consider the issues. Thus, we have error by the Trial Court. For the same reason *Tinsley* v. *Aetna Insurance Co.,* Mo., 205 S. W. 78 and *Fager* v. *Commercial Union Assurance Corporation,* Mo., 176 S. W. 1064; Chapter 352.6, *Blashfield, Automobile Law and Practice,* p. 589; 46 *Corpus Juris Secundum Insurance,* Sec. 1294, p. 345; *Lopez* v. *USF&G Company,* 18 FRD 59 (D.C. Alaska); *Strickland, Jr.* v. *Transamerica Insurance Company,* CA 5th, 481 F. 2d 138 and *State Farm Automobile Insurance Company* v. *Koval,* CA 10th, 146 F. 2d 118 are not in point.

For the foregoing reasons the Court should have considered the issues before the Court on the pleadings

and sustained American's Motion for a Directed Verdict as well as its Motion for Judgment Notwithstanding the Verdict.

B. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT PERMITTING THE FILING OF THE FIRST AND SECOND AMENDED ANSWERS.

As to the Appellant's position on this point, reference is made to pages 65-67 of the Brief-in-Chief and the arguments contained therein. In this Brief we will restrict our arguments to a reply to those made by the Appellee on pages 33-38 of his Brief-in-Chief.

On May 19, 1975 (T.R. 10) American filed its Amended Answer alleging (1) that Mary Bartlett was covered by a policy of liability insurance (T.E. 12) issued by Aetna Casualty Insurance Company which contained uninsured motorist coverage in the sum of $10,000; the uninsured motorist coverage of American is secondary to that of Aetna (T.R. 10); (2) that the Administrator of the Bartlett Estate had settled with Aetna for $25,000 and this released the American Insurance Company (T.R. 13); (3) in the alternative that American is entitled to a reduction under the reducing clause in this policy (T.R. 13); (4) and that there was no physical contact between the vehicle, and therefore the uninsured motorist provision of American's policy did not apply (T.R. 13). This Motion was overruled (T.R. 11) on June 2, 1975. At the beginning of the trial on June 19, 1975 (T.E. 8), American moved the Court to file the Amended Answer which was overruled by the Court.

During the taking of the deposition of Jerry Bartlett on May 29, 1975 (Bartlett Depo. 28-40), it was discovered there was another agreement besides the Release between Aetna and the Bartlett Estate. Demand was made for production at that time and a promise to secure it was made by counsel for the Bartlett Estate. Counsel for Bartlett did not produce it until ordered to do so by the Court on first day of the trial (T.E. 3, 12-13 Def'd. Tendered Exhibit 1). This Indemnification Agreement conclusively showed the prejudicial effect of the $25,000 settlement culminating in the Release between Aetna and the Bartlett Estate.

The question of primary coverage and secondary coverage was reserved as a question of law depending on the jury verdict in accordance with the agreement of counsel (T.E. 13).

The case was not pre-tried (T.E. 163) through some slipup in the normal operation procedure of the Trial Court. There is no suggestion of bad faith on behalf of the Defendant as noted by the Trial Court (T.E. 163).

CR 15.01 states:

> ". . . otherwise a party may amend his pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

Certainly, given this set of facts justice does so require the permission to file the Amended Answer and Supplemental Answer because the issues were already raised in the original Answer but clarified in these

two additional Answers. In this situation *Ashland Oil & Refining Co.* v. *Phillips,* Ky., 404 S. W. 2d 449, as well *Rietze* v. *Williams,* Ky., 458 S. W. 2d 613 are authority for holding that there was an abuse of discretion in not permitting the filing of the amendments.

It seems most unusual that the Appellee after having refused to give the "Indemnification Agreement" for examination to the Attorney for American until the morning of trial when so ordered by the Court, to now come forward and say there is no excuse for the delay. In addition, on May 19, 1975, he knew these defense and resisted them. There is no element of surprise at all involved herein, especially when Counsel agreed that the issue of primary or secondary coverage is a question of the law to be decided by the Court after the verdict was in depending on whether the issue was pertinent depending on the return of the jury's decision.

Clearly, in this case all of the facts were not in the possession of the Defendant and deliberate efforts were made by the Bartlett Estate to hide the facts.

In *Ben P. Fyke & Sons, Inc.* v. *Gunter Company,* Mich., 213 N. W. 2d 134, 138 the reasoning of this Court in the Ashland Oil case is approved, and the Opinion is interpreted as follows:

> "In effect, the Court stated that 'justice' 'requiring' was not a prerequisite for the filing of an amendment. Rather, such an amendment will be denied only if it would work 'an injustice in the particular circumstance.' "

See also *Foman* v. *Davis,* 317 U. S. 178, 182, 83 S. Ct. 227, 230 wherein the Supreme Court of the United States held that the District Court abused its discretion in not permitting the filing of an amendment to a Complaint alleging another theory of a cause of action after Judgment had been rendered. The Supreme Court stated at page 182 as follows:

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded.' "

This Court should so interpret the Kentucky Rules of Civil Procedure the same as the Supreme Court of the United States does the Federal Rules of Procedure which are word for word the same in this instance.

Nevels v. *Ford Motor Company,* CA 5th, 439 F. 2d 251 relied on by the Appellee is not in point. The move to amend was made two years and four months after the original Answer was filed. Here the original Answer was filed on December 27, 1974, and the case was tried on June 19, 1975, approximately six months later rather than two years. In addition, the Amended Answer was tendered five months after the original Answer and before the completion of discovery. Thus, this case is not in point.

Gaylord Shops, Inc. v. *Southern Hills Shoppers City, Inc.,* 33 F.R.D. 303 (D.C. Pa.), and *Redmond* v. *O'Sullivan Rubber Co.,* 10 F.R.D. 536 (D.C. Va.) are not in point for the same reason. In both cases all of the facts were in the knowledge of the Defendant at the time the original Answer was filed. In the present

case no knowledge of the facts was with the Defendant at the time the original Answer was filed. American's first notice of any claim by its own insured was when it received the Summons filed in this suit on December 16, 1974 (T.E. 170). The Bartlett Estate had given no notice to its own insurer, American, of the accident until receipt of the Summons on December 16, 1974 and the Answer was required to be filed shortly thereafter. No notice had been given of the settlement by the Bartlett Estate with Aetna nor were the complete circumstances revealed until the Indemnification Agreement was introduced on Order of the Court on the first day of trial. That Indemnification Agreement occurred after the suit was filed for it was dated February 15, 1975 (Def'd. Exhibit 1). Thus, the defenses developed after the Answer of American was filed. For these reasons these two cases are not in point. These reasons are recognized as a valid distinction in a discussion of the Gaylord case, supra, in *Jenn-Air Products Co.* v. *Penn Ventilator, Inc.,* E.D. Penn., 283 F. Supp. 591, 594.

Billy Baxter, Inc. v. *Coca-Cola* (D.C. N.Y.), 47 F.R.D. 345 is not in point for here a period for better than two years was involved after the filing of the original Answer to file the amendment. There is no such situation here in that the case was tried within six months after the Answer was filed.

For the above reasons set forth under CR 15.03 it is clear that the Trial Court should have permitted the filing of the Amended Answer and Supplemental Answer because justice so requires and that the leave

should be freely given. Also, because of Rule 15.02 concerning amendments to conform to the evidence for these matters were reserved as matters of law.

2. **The Uninsured Motorist Portion of the Insurance Policy of the Defendant Insurer, American Automobile Insurance Company, of the Insured, Plaintiff's Decedent, Did Not Apply Because it is Uncontroverted That Neither the Representative Nor Counsel Nor Anyone For and on Behalf of the Plaintiff's Decedent Obtained the Consent of This Defendant, American Automobile Insurance Company, as Required by the Provisions of Said Policy Holding That the Uninsured Motorist Portion Does Not Apply to Bodily Injury (Death) to an Insured With Respect to Which Such Insured, His Legal Representative, or Any Person Entitled to Payment Under This Section Shall, Without Written Consent of the Company, Make Any Settlement With Any Person or Organization Who May be Legally Liable Therefor; and Plaintiff's Proof and Defendant's Proof Through Avowal Show Conclusively That the Plaintiff Received a Settlement of $25,000.00 From the Insurer of the Host Driver of the Plaintiff's Decedent Without Any Knowledge of This Defendant or Any of Its Representatives at Said Time and Not Until After Said Settlement and no Consent Was Ever Given.**

The Appellant reiterates the arguments made in its Brief-in-Chief on page 33-51 on this point. In addition, it must be pointed out that this Court in *Newark Ins. Co.* v. *Ezell,* Ky., 520 S. W. 2d 318 decided on March 7, 1975 while this case was pending that the "consent" requirement in the uninsured motorist provision is a legitimate protective provision for the in-

sured adopting the reasoning in *MFA Mutual Ins. Co.* v. *Bradshaw,* 245 Ark. 95, 431 S. W. 2d 252. However, the Court did not enforce the provision because there was no claim by Newark that any of the protective purposes was impaired or it suffered prejudice in any way. American on the other hand has suffered such prejudice and the protective purposes of the "consent clause" have been violated. American lost it subrogation rights, its Trust Agreement rights, the inconsistent recoveries made against Aetna on liability and not on its uninsured motorist coverage, and against American on the uninsured motorist coverage alone. Here there has been a double recovery and to prevent such double type coverage and double type claims as well as duplicity, such a provision is valid and necessary as well as not in contravention of the Kentucky Statutes or Public Policy. Certainly, there has been all kinds of prejudice in this situation.

The Appellee in its argument has completely ignored the provisions of KRS 304.20-020(2) which provides:

> "For the purposes of this coverage, the term 'uninsured motor vehicle' shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle . . ."

As well as the case of *Allen* v. *West American Ins. Co.,* Ky., 467 S. W. 2d 123 where against a similar attack the household exclusion contained in a policy prevails as to uninsured motorist coverage and is not contrary to KRS 302.20-020. It is for this reason that the cases cited in this section by the Appellee are not applicable.

Rosenbaum v. *Safeco Ins. Co. of America,* Ky., 432 S. W. 2d 45 is not in point. This case simply determined that a horse drawn farm vehicle was not an "uninsured motorist" under Safeco's policy. There is no discussion of the statutes cited by the Appellee in this case.

Alabama Farm Bureau Mut. Cas. Ins. Co. v. *Clem,* Ala., 273 So. 2d 218 relied on by the Appellee is not in point because of the difference in the uninsured motorist statutes. As noted in this case at page 221, Alabama's Statute contains no such provision for the protection of subrogation rights to the insurer who pays a claim under the uninsured motorist provisions of its policy. The Alabama Court clearly pointed out that this distinction determined the difference as to whether such a "consent" clause is valid. In Kentucky our Statute does provide for the protection of subrogation rights of the insurer who pays a claim under the uninsured motorist provisions of its policy. KRS 304.20-020(4) provides as follows:

> "(4) In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer."

Please note that this section provides that the insurer shall be entitled to the proceeds of "any settlement or judgment resulting". Thus, clearly our Statute being different the Alabama Farm Bureau Mutual Casualty Insurance Company v. Clem, supra, is not in point as well as *Alabama Farm Bureau Mut. Cas. Ins. Co.* v. *Humphrey,* Ala., 308 So. 2d 255. For the same reason the following cases cited by the Appellee are not appropriate: *Kaplan* v. *Phoenix of Hartford Ins. Co.,* Fla., 215 So. 2d 893; *Shamey* v. *State Farm Mutual Automobile Insurance Co.,* Pa., 331 A. 2d 498; *Raitt* v. *Nat'l. Grange Mutual Insurance Co.,* N.H., 285 A. 2d 799; *Hawaiian Insurance and Guaranty Co.* v. *Mead,* Wash., 538 P. 2d 865; *Taylor* v. *Great Central Insurance Co.,* Minn., 234 N. W. 2d 590; *Michigan Mutual Liability Co.* v. *Karsten,* Mich., 163 N. W. 2d 670; *Harthcock* v. *State Farm Mutual Auto Ins. Co.,* Miss., 248 So. 2d 456; *Guthrie* v. *State Farm Automobile Insurance Co.* (D.C. So. Ca.), 279 F. Supp. 837. *Rhault* v. *Tsagarakos* (D.C. Vt.), 361 F. Supp. 202 is not in point because the Vermont Statute does not contain the same provisions as KRS 304.20-030(2)(4) as to the terms which may be contained in the uninsured motorist policy.

A citation of the cases holding that the "consent" clause is valid in uninsured motorist coverage is contained at 25 A.L.R. 3rd 1275.

Thus, for the reasons stated above as well as the reasons in our Brief-in-Chief, clearly under the terms of the policy and under the undisputed proof in this case a Directed Verdict or a Motion Notwithstanding

the Verdict should have been sustained by the Trial Court because of the settlement made by the Plaintiff with the insurance carrier for the host driver without the knowledge or consent, oral or written of the Defendant, American Insurance Company, as required under the provisions of its uninsured motorist coverage. Moreover, KRS 304.20-030(4) American is entitled "to the proceeds of any settlement . . . resulting from the exercises of any rights of recovery of such person against any person . . . legally responsible for the bodily injury for which such payment is made. . . ." The Bartlett Estate having received $25,000.00 from Aetna would owe the $10,000.00 to American if American should make any such payment. Thus, there is nothing due the decedent's Estate under the uninsured motorist statute of Kentucky which is a part of every policy and expresses the public policy of the State of Kentucky through the enactment of the Legislature.

3. **Defendant, American, Was Further Entitled to Judgment Upon Its Motion For Directed Verdict as Well as Upon Its Motion For Judgment Notwithstanding the Verdict Because of the Provisions of Said Policy as Follows:**

> **"(b) Any amount payable under the terms of this Part because of bodily injury (death) sustained in an accident by a person who is an insured under this Part shall be reduced by**
>
> **(1) all sums paid on account of such bodily injury (death) by or on behalf of (i) the owner or operator of the uninsured automobile and (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under Coverage A . . ."**

Since $25,000.00 Was Admittedly Paid by the Insurer, Aetna Life & Casualty Company, of Decedent's Host, Thacker, the Insured, There is no Sum Due Under the Uninsured Motorist Portion of Defendant's (American's) Policy by Reason of This "Reducing Clause."

Zurich Insurance Company v. *Hall,* Ky., 516 S. W. 2d 861 and *Meridian Mutual Insurance Company* v. *Siddons,* Ky., 451 S. W. 2d 831 are not in point as pointed out in our Brief-in-Chief at page 56. These two cases deal with the uninsured motorist provisions as provided by KRS 304.682(1). Neither of the cases deal with the reducing clause as contained in KRS 304.20-020(4) (1970).

The legislature has expressed its intent concerning the requirements of reducing clauses as same pertain to uninsured motorist provisions of insurance policies and has authorized same by Statute. There is nothing inconsistent between KRS 304.20-020(1) and (4). The

"reducing clause" is perfectly consistent with the terms of this Statute. Since by Statute such a reducing clause is authorized, it is up to the legislative branch of the government and not the judicial branch to invalidate that section of the Statute as its reducing clause is an integral part of the policy and Statute as a last resort protection. For this reason the Trial Court should have sustained the Motion for Judgment Notwithstanding the Verdict, as well as the Motion for a Directed Verdict.

4. The Uncontradicted Proof Showed That the Plaintiff Had Received a Settlement of $25,000.00 and by Reason of Said Settlement and the Proof Showing That the Limit of Liability of the Insurer of the Decedent's Host, Thacker, Being $25,000.00 For a Single Personal Injury or Death in a Single Accident and Was the Limit of the Obligation of Said Insured to Pay on Behalf of Said Insured the Sum Which the Insured Shall Become Legally Obligated to Pay as Damages Because of Said Injury (death) of the Plaintiff's Decedent by Reason of the Operation of Said Insured Vehicle, and There Was Additional Coverage of Uninsured Motorist With Said Company With the Insured Being the Host, Thacker, and Consequently the Plaintiff Having Collected and Settled the $25,000.00 Claim Against the Host, Thacker, by Reason of Her Alleged Negligent Operation of the Said Vehicle, Plaintiff is Estopped to Claim That the Uninsured Motorist Provision of the Defendant's Policy Comes Into Play Since the Two Positions Are Irreconcilable and in Conflict.

Under this section noted as D in the Appellee's Brief, no cases are cited. Therefore, the Appellant relies upon the argument contained in pages 57-60 in its Brief-in-Chief.

5. **Decedent's Host, Thacker, Had With Aetna Life and Casualty Company $10,000.00 Uninsured Motorist Coverage and $25,000.00 Liability Limit Coverage For Personal Injury to One Person or For Death to One Person in Each Occurrence and Settled Said Total Exposure of $35,000.00 if There Had Been Joint Negligence For the Sum of $25,000.00, and Defendant is Entitled to a Credit of $35,000.00 Being the $10,000.00 Uninsured Motorist Coverage and the $25,000.00 Bodily Injury Coverage of the Host, Thacker, as Primary Insurance Before the Secondary Uninsured Motorist Coverage of the Defendant as the Insurer of the Plaintiff's Decedent Comes Into Effect.**

The Appellant relies on the argument contained in pages 60-64 of its Brief-in-Chief.

The question of "primary" and "secondary" coverage is clearly one before the Court. Before the trial of the action began Mr. Bensinger stated to the Court and Counsel as follows (T.E. 11):

> "Aetna gave me $25,000.00 under their liability policy. Now both Aetna and American Automobile have this uninsured primary secondary question of $10,000.00. There is a question of who comes first and who comes second of the $10,000.00." . . .

In addition, the following conversation occurred between Counsel before the Court and before the trial (T.E. 13):

> "Mr. Hobson: Well, I'd like for it to be made a part of the record, please, Miss Mary, the indemnification agreement, and, Mr. Bensinger, what you said I completely concur with with the one

reservation that it strikes me clear that our coverage is secondary and the Aetna coverage is primary and if you have agreed that, and you have agreed as indicated by that indemnifying agreement, that if a verdict is returned of $35,000.00 or less we owe nothing unless you can show the Court that our coverage is primary, as we understand the concept of primary and secondary coverage. If it's in excess of $35,000.00 we owe up to $45,000.00.

Mr. Bensinger: Well, that's the real question. I think we're going to see whether we'll get into that or not, whether your $10,000.00 comes in after twenty-five or after thirty-five which may be a moot question after this case.

Mr. Hobson: It could very easily be. Alright. Then we understand each other."

From the above agreement between Counsel in front of the Court it is clear that the question of primary or secondary coverage was to be considered as one of law for the Court to answer depending on the amount of the verdict. Here the verdict of the jury (T.E. 207) was $34,000.00 and thus the question is presented, and the Appellee is not accurate in stating that the question should not be before this Court.

"Other similar insurance available" was available to the Bartlett Estate. The automobile involved in the accident in which the Plaintiff's decedent was a passenger belonged to Thacker and was covered by a policy of insurance covering bodily injury liability in the amount of $25,000.00 for a single person and uninsured motorist coverage in the amount of $10,000.00 (T.E. 152-153). Aetna admitted that its total exposure was $35,000.00 if there was joint negligence between

Thacker and the phantom vehicle. It was through the action of the Bartlett Estate and its Attorney in settling with Aetna and giving Aetna an Indemnification Agreement that they lost their rights against Aetna. However, after the accident this coverage was available to the Bartlett Estate as well as that contained in the uninsured motorist coverage of American (T.R. 15 Def'd. tendered Exhibit 1). Thus, the definition contained in the American College Dictionary quoted at page 27 of the Appellee's Brief as to the word "available" is readily met because the Bartlett Estate executed the Release and Indemnification Agreement releasing the uninsured motorist coverage of Aetna. Aetna didn't do this alone, it took the concerted action of both. (See T.R. 27 concerning the position of American as to primary and secondary coverage.) *Kraft* v. *Allstate Insurance Co.,* Ariz., 431 P. 2d 914 and *American Mutual Insurance Co.* v. *Romero,* 428 F. 2d 840 are not in point because the uninsured motorist statutes are different, and do not contain the provisions of KRS 304.20-020(2)(4) permitting the policy to contain "terms and conditions of such coverage" and providing that if there is a settlement the uninsured motorist insurer is entitled to the proceeds of the settlement or judgment against any person or organization legally responsible. Thus, in view of the difference in our Statute and that contained in Kraft, supra and American Mutual Insurance Company v. Romero, supra, those two cases are not in point.

Ohio Casualty Insurance Company v. *State Farm Mutual Automobile Insurance Company,* Ky., 511

S. W. 2d 671 is not in point because it does not deal with the uninsured motorist statute of Kentucky, as well as the provisions of the policy pertaining to uninsured motorist. The question presented was the policy language concerning the duty of defense and indemnification against a judgment. Two policies were involved on the same automobile, one being a regular automobile liability policy and the other being a garage liability policy. This Court held that each insurer is jointly obligated to defend and to indemnify up to the limit of the smaller of the two policies (Ohio Casualty) and the State Farm for the remainder up to the limit of its policy. This is not the same question as is here involved. Moreover, if this Opinion were applicable it would mean that as to the amount of the judgment over $25,000.00, Aetna would owe half and American would owe half to the Bartlett Estate. No such contention has been made by anybody.

The Court's attention is directed to additional cases which hold or recognize the validity of "other insurance" provisions in a policy providing protection against injuries caused by an uninsured motorist: *MFA Mutual Ins. Co.* v. *Wallace,* 245 Ark. 230, 431 S. W. 2d 742; *Darrah* v. *California State Automobile Ass'n.,* 259 Cal. App. 2d 243, 66 Cal. Rptr. 374; *Burchman* v. *Farmers Ins. Exch.,* 255 Iowa 69, 121 N. W. 2d 500; *LeBlanc* v. *Allstate Ins. Co.,* La., 194 So. 2d 791; *Maryland Casualty Co.* v. *Howe,* 106 N.H. 422, 213 A. 2d 420; *Globe Indemnity Co.* v. *Bakers Estate,* 253 N.Y.S. 2d 170; *Martin* v. *Christensen,* 22 Utah 2d 415, 454 P. 2d 294; *Miller* v. *Allstate Ins. Co.,* 66 Wash. 2d

871, 405 P. 2d 712; *Pinkus* v. *Southern Farm Bureau Casualty Company,* D.C. Ark. 292 F. Supp. 141; *Harris* v. *Southern Farm Bureau Casualty Ins. Co.,* Ark., 448 S. W. 2d 652; *Certified Indem. Co.* v. *Thompson,* Colo. 505 P. 2d 962; *Alliance Mut. Casualty Co.* v. *Duerson,* Colo., 518 P. 2d 1177; *Putnam* v. *New Amsterdam Casualty Company,* 48 Ill. 2d 71, 269 N. E. 97; *Pestka* v. *Safeway Ins. Co.,* Ill., 298 N. E. 2d 270.

Thus, under the above authorities since both the liability and uninsured motorist coverage were available from the primary carrier, Aetna, the insurer of the Thacker automobile which was involved in the accident in the amount of $35,000.00, and since the verdict of the jury was less than the sum there is no insurance in effect under the American's uninsured motorist provisions. Aetna was the primary carrier and its insurance was not exhausted except at the election of the Bartlett Estate. For this reason the judgment of the Trial Court should be reversed.

6. Under the Undisputed Facts in This Case American Automobile Insurance Company Was Entitled to Have Its Motion For Directed Verdict Sustained by the Trial Court as Well as Its Motion for Judgment Notwithstanding the Verdict Sustained. The Trial Court Abused Its Discretion in Not Permitting to be Filed the Amended Answer Tendered One Month Before Trial or the Supplemental Answer Tendered to Conform to the Proof.

The Appellant reiterates each and every argument contained on pages 65 and 66 in its Brief-in-Chief. In addition, the arguments made by the Appellee on pages 33 through 38 of his Brief-in-Chief are answered under Section 1 (b), of the Argument in this Brief contained at pages 12-17.

CONCLUSION

For the reasons set forth, justice had been denied, and the Judgment of the Trial Court in the amount of $9,000.29 against the American Automobile Insurance Company should be reversed, and the Trial Court directed to enter a Judgment for the Defendant, American Automobile Insurance Company, dismissing the Complaint.

Respectfully submitted,

ROBERT C. HOBSON
JOHN P. SANDIDGE
1805 Kentucky Home Life Building
Louisville, Kentucky 40202

Attorneys for Appellant

Of Counsel:

WOODWARD, HOBSON & FULTON